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No. 998

In The

Supreme Court of the United States

OCTOBER TERM, 1964

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS LOCAL UNION 612

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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1.

We do *not* present "so narrow an issue, which turns on the facts of the particular case" as Respondent asserts at Opposition page 7. Rather, we challenge what Respondent's attorneys assert is the "settled rule" that a bargaining request for a unit which includes some employees later found to be supervisors relieves the employer of the duty to bargain.

Respondent's attorneys cite no authority for the assertedly "settled rule", Opp[illegible]ion p. 7.[1] There could be none. For by §14(a) of the Act the inclusion of supervisors in a bargaining unit is permissive. True, an employer may not be compelled to bargain for supervisors, but such bargaining is permissive under §14(a), which specifically envisages supervisors becoming and remaining members of a labor organization.[2] The Congress was at pains to permit their inclusion in bargaining units.[3]

To hold that the mere proposal of that which the Act permits obliterates the duty to bargain, is as the District of Columbia Circuit has held, "arbitrary." *Brewery Workers v. NLRB,* 103 App. D.C. 190, 257 F.2d 194 (C.A. D.C., 1958).

2.

Respondent's attorneys twist the facts at Opposition page 8. There they imply that the status of twenty (of the more than 260) drivers "had been a major issue in the negotiations." Actually neither

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[1] The Board cases cited at Opposition p. 8 do not involve supervisors. *Alabama Marble,* 83 NLRB 1047, 1070 involves "guards", specifically treated in §9 of the Act. *Page Aircraft,* 123 NLRB 159, 164 deals with attempts to include plant clericals contrary to bargaining history, and Board precedent; *Quality Food,* 129 NLRB 349, 351 merely holds that two stores of a chain, separately managed cannot be regarded as a single or integrated operation.

[2] Section 14(a) provides: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organizing nor does it prohibit any employer from recognizing a union of individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

[3] The Senate Report noted: ". . . the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen."

employer nor union ever raised the point. Both employer and union agreed that these drivers were *not* supervisors. Deaton's brief to the Court of Appeals flatly stated: "We believe that the Board's finding that the multiple owner-drivers are Deaton's supervisors cannot stand." See Petition pp. 12-13.

The only issue as to the status of *any* drivers was whether all were "employees" as union asserted, or "independent contractors" as Deaton asserted.

The Board found "that the drivers, including owner-drivers and multiple owner-drivers, *are employees of Deaton.*" See text of Board Decision at ftnt 7, Petition, Appendix B, at p. 10b, emphasis added.

True, the Board more than a year later noted that the multiple owner-drivers possess the power substantially to effect the hire and discharge of the drivers of their other leased trucks (Board Decision at Petition App. B, p. 11b). But the fact remains that the issue of the status of these drivers as "supervisors" was never raised in the negotiations between the parties. It certainly was never "a major issue in the negotiations" as Respondent's attorneys suggest.

3.

As the Opposition states (p-9) there was a Board finding that the multiple-owner-drivers exercise supervisory authority.

But the Board made no finding as to whether this authority was exercised *in the interest of the*

employer Deaton — an essential to establishing status as "supervisor" within the meaning of the definition in Act §2(11), 29 USC §152(11).

This deficiency was drawn to the Board's attention; the Board first issued a show cause order indicating that it intended further hearing and further decision on the issue (R. 110-112). Then "having duly considered the matter, but being unable to arrive at a majority" (R. 152) the Board failed to determine whether the authority was exercised in the interest of Deaton.

The Opposition attempts to supply by argument of counsel (pp. 9-10) the essential finding as to which the Board was unable to find a majority. We respectfully insist that it is the Board's order—and its propriety or deficiency—which is here to be tested, not the speculation of counsel as to a finding which the Board did not make. See *NLRB v. Metropolitan Life Ins. Co.* .....U.S. ....., 58 LRRM 2721 at 2723 (April, 1965).

Wherefore, certiorari should be granted.

Respectfully,

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